the whole discussion is that it is a discriminatory law, and not a discriminating contract that is being attacked. It can scarcely be doubted that such a law, arbitrarily discriminating among citizens of the United States, could never be sustained on the state's right to contract as it sees fit.[8]

Is the petitioner in any other case under the treaty than under the Constitution? The court seems to say that he is not, but in order to put another leg under the doctrine of state freedom of contract, it adverts to another famous case[9] defining the privileges and immunities of citizens of the United States, as interpreted in the light of the same Italian treaty by a recent decision.[10] Corfield v. Coryell held that citizens of the United States have no inherent right in the common property of the citizens of any state, and that fish and game constitute such a common property. An Italian, deprived of his hunting privileges by a Pennsylvania statute, invoked the Italian treaty, and Patsone v. Pennsylvania decided no more than that it was only personal and property rights that the treaty guaranteed, and that the right to hunt was a property right of citizens of Pennsylvania only.

Now if there ever was an unequivocal decision of the Supreme Court it was that in the Slaughter House Cases[11] to the effect that the right to labor is a sacred property right, and if the present case is sound the inevitable conclusion is that the right to labor on a state contract is common property of citizens of the state alone. But even if this be true, while it might then be admitted that the state could exclude all but its own citizens, still, if it graciously gave others the privilege of participation, could it classify and discriminate among the objects of its beneficence, on any such basis as color, race or (in the face of a treaty guaranteeing equality not only of right but of *privilege*) alienage?[12]

H. S. J.

CONTRACTS: EXCUSE OF PERFORMANCE BY EXISTENCE OF CONDITION CAUSING UNFORESEEN EXPENSE.—In *Mineral Park Land Company v. Howard*,[1] the defendant contracted to take from the plaintiff's land all the gravel necessary for the construction of a certain bridge, and to pay an agreed rate per cubic yard. Although the land contained enough gravel for his purpose, he took only half the necessary amount, securing the remainder elsewhere. In

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[8] Baner v. Portland, 5 Saw. 566, Fed. Cas. No. 777; Kennett v. Chambers (1852), 55 U. S. 38, 14 L. Ed. 321.

[9] Corfield v. Coryell (1823), 4 Wash. C. C. 371, Fed. Cas. No. 3230.

[10] Patsone v. Pennsylvania (1914), 232 U. S. 138, 34 Sup. Ct. Rep. 281, 58 L. Ed. 539.

[11] (1873), 16 Wall. 36, 21 L. Ed. 294.

[12] Gandalfo v. Hartman (1892), 49 Fed. 181; In re Tiburcio Parrott (1880), 1 Fed. 481.

[1] (March 21, 1916), 51 Cal. Dec. 356, 156 Pac. 458.

excuse, he proved that all except what he had taken was below water-level, and removable only at an expense of ten to twelve times the anticipated cost. It was held that this fact excused the defendant from further performance.

Mere difficulty of performance[2] or unexpectedly great expense,[3] resulting from conditions existing when the promise was made, but not known to the parties, will not excuse the breach of an unqualified promise. On the other hand, it is a general rule that a promise to do what is ab initio impossible is, in the absence of a warranty, not binding.[4] It follows from this last principle that when the subject matter of the promise is in whole or in part non-existent, performance is to that extent impossible, and the promisor is released pro tanto.[5] The tendency of the courts, when dealing with a hard bargain entered into through ignorance of the true conditions, has been to so construe the promise as to make it dependent upon the assumed existence of the subject matter. In such cases, it is said, the contract is made only upon the implied condition that the subject exist, as it is not the intent of the parties to impose a penalty for failure to perform the impossible.

This rule has been best developed in a series of cases involving the lease of mining privileges on royalties. Where the lessee promises to take out at least a certain amount of ore each year, or to pay royalties on that amount if he does not mine so much, the promisor is released if the mine contains no ore or it becomes exhausted.[6] "The contract is to pay for a stipulated quantity, whether mined or not, not whether it exists or not."[7] Only when the contract is plainly to pay a fixed rent for the use of the land, the lessee taking chances on its contents, will he be bound regardless of the presence of ore.[8] If ore is found only in such negligible quantities that it does not pay to mine it,[9] or is of worthless

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[2] Hills v. Sughrue (1846), 15 M. & W. 253, 153 Eng. Rep. R. 844; Jones v. St. John's College (1870), L. R., 6 Q. B. 115; White v. von Waffenstein (1905), 47 Misc. Rep. 670, 94 N. Y. Supp. 257.

[3] Beebe v. Johnson (1838), 19 Wend. 500, 32 Am. Dec. 518; Leavitt v. Dover (1891), 67 N. H. 94, 32 Atl. 156, 68 Am. St. Rep. 640; Hennessy v. Flemming Bros. (1907), 40 Colo. 27, 90 Pac. 77; Berry v. Wells (1914), 43 Okla. 70, 141 Pac. 444.

[4] Le Roy v. Jacobosky (1904), 136 N. C. 443, 48 S. E. 796; Bürgeriches Gesetzsbuch (German C. C., 1896), 306-7.

[5] Williams v. Miller (1885), 68 Cal. 290, 9 Pac. 166.

[6] Lord Clifford v. Watts (1870), L. R., 5 C. P. 577; Ridgely v. Conewago Iron Co. (1893), 53 Fed. 988; Blake v. Lobb's Est. (1896), 110 Mich. 608, 68 N. W. 427.

[7] Ridgely v. Conewago Iron Co., supra, n. 6.

[8] Marquis of Bute v. Thompson (1844), 13 M. & W. 487, 153 Eng. Rep. R. 202; Lehigh Zinc & Iron Co. v. Bamford (1893), 150 U. S. 665, 14 Sup. Ct. Rep. 219, 37 L. Ed. 1215; Powell v. Burroughs (1867), 54 Pa. St. 329; Flynn v. White, etc. Coal Co. (1887), 72 Iowa, 738, 32 N. W. 471; Valley City Milling Co. v. Prange (1900), 123 Mich. 211, 81 N. W. 1074.

[9] Hewitt Iron Mining Co. v. Dessau Co. (1902), 129 Mich. 590, 89 N. W. 365; Blake v. Lobb's Est. (1896), 110 Mich. 608, 68 N. W. 427;

quality,[10] it is considered as practically non-existent. The lessee is not obliged to extract every minute particle before he can claim that the ore has become exhausted. The court bases its decision in the principal case upon the foregoing rules, but extends them farther than previous cases have done, in holding that by "gravel" the parties meant "available gravel", and that the promisor was released when the "available gravel" became exhausted. The word "available" is virtually read into the actual agreement to cover a situation which probably never occurred to the parties, and to bring the facts within the operation of the rules on non-existence of subject matter.

The same conclusion is reached by the court through the syllogism, that what is unreasonably and excessively expensive is impracticable, and what is impracticable is, in legal intendment, impossible. We may conceive of situations where that proposition might be correct, but it cannot be laid down as a general rule. Performance which proves to be more than twice as costly as expected may well be considered unreasonably expensive, but promisors have been held bound by such promises,[11] and indeed in some instances where it was so thoroughly impracticable that the probable expense could not well be estimated with any accuracy.[12] Is the principle different when the expense can be fixed at ten times the normal? What the promisor actually does when he finds that the increased cost of performance will exceed the damages he will have to pay for failing to perform, is to choose the latter course. Beyond the point where damages and increased expense are equal, the size of such increase produces no added hardship upon the promisor, who pays the same damages whether the cost of performance be double or a hunderd times what he expected.

The court says, "Where the difference in cost, is so great as here, and has the effect of making performance impracticable, the situation is not different from that of a total absence of earth and gravel." This makes what seems to be an unnecessary exception to the general rule that unforeseen expense is no excuse.

O. C. P.

CORPORATIONS: IS A JUDGMENT AGAINST A DISSOLVED CORPORATION VOID?—The "conceded fact" that the dissolution of a corporation renders void any judgment pronounced against it after dissolution did not in *Llewellyn Iron Works v. Kinney*[1] lead to injustice being done to the plaintiff as it often has done. Mr.

Brick Co. v. Pond (1882), 38 Ohio St. 65.

[10] Bannan v. Graeff (1898), 186 Pa. St. 648, 40 Atl. 805.

[11] Janes v. Scott (1868), 59 Pa. St. 178, 98 Am. Dec. 328; Leavitt v. Dover (1892), 67 N. H. 94, 68 Am. St. Rep. 640, 32 Atl. 156; School Trustees of Trenton v. Bennett (1859), 3 Dutch. 513, 72 Am. Dec. 373.

[12] Beebe v. Johnson (1838), 19 Wend. 500, 32 Am. Dec. 518; Reid v. Alaska Packing Ass'n (1903), 43 Ore. 429, 73 Pac. 337.

[1] (Feb. 28, 1916), 51 Cal. Dec. 287, 155 Pac. 986.